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June 24, 2015

Via Electronic Mail to reg-comm@fca.gov
Laurie A. Rea
Director, Office of Secondary Market Oversight
Farm Credit Administration
1501 Farm Credit Drive
McLean, VA 22102-5090

Re: Comment Letter – RIN 3052-AC89

Dear Ms. Rea:

Potter Anderson & Corroon LLP ("Potter Anderson," "we," "our") has been engaged by the Federal Agricultural Mortgage Corporation ("Farmer Mac"), a publicly-owned, New York Stock Exchange-listed, federally chartered instrumentality of the United States, to provide comments to the Farm Credit Administration (the "FCA") in response to its proposed rules (the "Proposed Rules") related to Farmer Mac's board governance and standards of conduct, including director election procedures, indemnification, fiduciary duties and conflicts of interest.[1] In retaining Potter Anderson, Farmer Mac specifically sought the unique expertise and perspectives of Myron T. Steele, a senior partner at Potter Anderson who has spent the past four decades addressing issues relating to corporate governance and the rights and obligations of stockholders and corporations. Mr. Steele joined the firm after serving as the Chief Justice of the Supreme Court of Delaware, a Judge of the Superior Court of Delaware and a Vice Chancellor of the Delaware Court of Chancery following eighteen years in private litigation practice. Mr. Steele has published over 400 opinions resolving disputes among members of Delaware entities, including publicly traded and close corporations, limited liability companies and limited partnerships. Mr. Steele also speaks and writes frequently on issues of corporate governance, and serves as an Adjunct Professor of Law at University of Pennsylvania Law School, University of Virginia Law School and Pepperdine University Law School. The College of Corporate Governance Counsel elected Mr. Steele to its initial founding Board. As a result, he became one of the ten founding members of a body limited to fifty members nationally. In addition, in 2014, The National Association of Corporate Directors elected him to their Corporate Governance Hall of Fame for his career body of work in the area. For a more complete perspective on Potter Anderson and on Mr. Steele's experience, expertise and unique perspectives relevant to the issues being commented on in this letter, we refer you to a current copy of Mr. Steele's curriculum vitae attached as Annex A to this letter.

[1] 80 Fed. Reg. 15931 (March 26, 2015). *See also* 12 C.F.R. Parts 650, 651, 653, and 655.

Our comments below on the Proposed Rules will serve primarily to direct the FCA toward several established, recognized and well-developed statutory frameworks and common law sources that provide established standards of corporate governance, including the Revised Model Business Corporation Act[2] (the "Model Act"), the General Corporation Law of the State of Delaware (the "DGCL") and Delaware case law, and the D.C. Business Organizations Code (the "D.C. Code") and D.C. case law.[3] This letter provides an Executive Summary of our concerns about the Proposed Rules, discusses the relevant provisions of the Proposed Rules from the standpoint of statutory and common law corporate governance principles, and provides specific comments regarding the Proposed Rules. As discussed in more detail throughout this letter, we believe that:

- many provisions of the Proposed Rules deviate from established, recognized and well-developed statutory and common law corporate governance principles;

- the Proposed Rules, if enacted, would inject significant confusion and uncertainty into the corporate governance of Farmer Mac and, consequently, could have adverse consequences for Farmer Mac's safety and soundness and mission fulfillment; and

- to the extent the FCA deems it necessary to have Farmer Mac adhere to a specific body of corporate governance principles (in addition to those already prescribed by the SEC and the NYSE and currently applicable to Farmer Mac), the FCA should permit Farmer Mac to designate an existing well-developed, established and recognized body of governing principles of corporate governance, rather than create a brand new and untested corporate governance framework that is in many aspects inconsistent with most established and recognized corporate governance frameworks.

I. Executive Summary

The single most important aspect of good corporate governance is the ability of an organization to attract and retain the best and most qualified individuals to serve on the board of directors, and for the directors to make good faith decisions and carry out their fiduciary duties to an organization and its stockholders with certainty and predictability and without fear of undue penalty. In the absence of a governance system that fosters certainty and predictability with respect to director conduct and encourages directors to make good faith decisions without fear of undue penalty, Farmer Mac could face harmful and unintended consequences, including difficulty recruiting individuals with the required background and expertise to serve on the board of directors of Farmer Mac (the "Farmer Mac Board"). Moreover, by injecting confusion and uncertainty into the standards by which a director's conduct would be measured, the Proposed Rules subject Farmer Mac directors to potential personal liability with no framework to gauge how a fiduciary duty claim would be resolved, and exposes Farmer Mac to potential private lawsuits for violations of the novel, untested and often ambiguous governance standards articulated in the Proposed Rules.

As outlined below, many aspects of the Proposed Rules are also inconsistent with well-

[2] *Model Business Corporation Act Annotated* (4th ed., 2013 Supp.) (the "*Model Act*").

[3] In preparing this commentary, we have primarily reviewed the relevant provisions of these statutory and case law resources, as well as Title VIII of the Farm Credit Act of 1971, as amended (*see* 12 U.S.C. §§ 2279aa et. seq.) and the issuance of final rules by the FCA for Farmer Mac dated March 1, 1994 (*see* 59 Fed. Reg. 9622).

developed, established and recognized corporate governance standards, including the Model Act, the DGCL and the D.C. Code. The Proposed Rules also contain numerous novel, vague and undefined terms that do not find support in any existing common law or statutory corporate governance regime, including, among other terms, "over-indemnification," "without discrimination," and "non-private or non-privileged corporate business and related matters." We caution in the strongest terms that the use of untested and vague language in the Proposed Rules, if enacted, would inject significant confusion and uncertainty into the corporate governance of Farmer Mac, and leave the Farmer Mac Board with no predictability or clarity to determine the standards by which director conduct or decisions made by the Farmer Mac Board would be evaluated.

We concur with Farmer Mac that the confusion and uncertainty created by the Proposed Rules could impede the Farmer Mac Board in its ability to address the complex and varied decisions it faces as it seeks to fulfill its statutorily-mandated mission of serving rural America. We also concur with Farmer Mac that, to the extent the FCA deems it necessary to have Farmer Mac adhere to a specific body of corporate governance principles (in addition to those already prescribed by the SEC and the NYSE and currently applicable to Farmer Mac), the FCA should permit Farmer Mac to designate an existing well-developed, established and recognized body of governing principles of corporate governance, such as the Model Act, the DGCL, or the D.C. Code, rather than create a new untested corporate governance framework that is in many aspects inconsistent with most established and recognized corporate governance frameworks. Allowing Farmer Mac to designate an established common law or statutory framework for corporate governance would be consistent with the affirmative decision made by the United States Congress to charter Farmer Mac, not as a cooperative within the Farm Credit System, but rather as a corporation with a governance model that mirrors that of other corporations, including that it be governed by and operated under the direction of a board of directors with the powers that most other corporate boards have, including the power to prescribe bylaws not inconsistent with law. In addition, this course of action would provide a level of certainty and predictability to the Farmer Mac Board in addressing the complex and varied decisions it faces as it seeks to fulfill its mission. No level of comparable certainty or predictability is likely to be attainable through the Proposed Rules. Furthermore, if the FCA were to permit Farmer Mac to designate an existing well-developed, established and recognized body of corporate governance principles to follow, it would be adopting an approach that has already been followed by the Federal Housing Finance Agency ("FHFA"), the primary regulator of the Federal National Mortgage Association ("Fannie Mae") and the Federal Home Loan Mortgage Corporation ("Freddie Mac"), which are also federally chartered corporations.[4]

II. Introduction – Statutory and Common Law Standards in Corporate Governance

As noted above, in developing our comments with respect to the Proposed Rules, we have compared selected provisions of the Proposed Rules with the established corporate governance concepts found in the Model Act, the DGCL and Delaware case law, and the D.C. Code. The Model Act was developed and approved by the Committee of Corporate Laws of the Section of Business Law of the American Bar Association, and "is designed as a free-standing general corporation statute that can be enacted substantially in its entirety by a state legislature."[5] As of June 2013, when the Model Act was

[4] *See* 12 C.F.R. § 1710.10.

[5] *Model Act*, at ix. The Congressional Record indicates that the bill to adopt changes to the D.C. Code adopting substantially all of the Model Act "proposes a corporation act which is patterned on the Model Business Corporation Act." 100 CONG. REC. 7055-56 (1954).

last updated, thirty-two jurisdictions, including the District of Columbia,[6] have adopted all or substantially all of the Model Act as their general corporation statute.[7] In addition to the Model Act, we reference the DGCL, which has been described as "an enabling statute intended to permit corporations and their [stockholders] the maximum flexibility in ordering their affairs."[8] Delaware has also been characterized by commentators as "the preeminent state in corporate law," and a majority of publicly traded Fortune 500 companies have chosen to incorporate in Delaware in order to take advantage of Delaware's extensive and well-developed body of corporate jurisprudence which affords a measure of certainty and predictability to Delaware corporations that enables both corporate boards and business managers to accurately assess the legal consequences of their actions.[9] That predictability is continuously enhanced by the extensive case law that has been developed by the Court of Chancery, a Court of equity that routinely handles cases involving complex corporate governance issues with a level of experience and a degree of sophistication and understanding unmatched by other courts in the country. In addition to the Model Act and the DGCL, both of which are viewed as authoritative sources for established corporate governance standards,[10] our comments also reference the D.C. Code, given the location of Farmer Mac's principal executive offices in the District of Columbia. As noted in our comments, to the extent the FCA deems it necessary to require Farmer Mac to adhere to a specific set of corporate governance principles, we believe that the FCA should follow the precedent created by Fannie Mae's and Freddie Mac's primary regulator and permit Farmer Mac to elect to follow an established, recognized and well-developed common law or statutory framework of corporate governance principles in order to provide predictability and certainty regarding the interpretation and practical application of the regulations applicable to Farmer Mac.

III. Comments Regarding the Corporate Governance Provisions of the Proposed Rules

This section describes Potter Anderson's particular comments with respect to parts of the Proposed Rules relevant to established corporate governance standards and proposes changes to specific language included in the Proposed Rules, as applicable, to address our comments.

Definitions (Proposed 12 C.F.R. § 651.1, Subpart A)

Proposed section 651.1 would define "reasonable person" to mean "a person under similar circumstances exercising the average level of care, skill, and judgment in his or her conduct based on societal requirements for the protection of the general interest." Although the Proposed Rules

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[6] *See* D.C. Code § 29-107.03 (2011); *see also Robertson v. Levy*, 197 A.2d 443-44 (D.C. 1964) (stating that "[t]he Business Corporation Act of the District of Columbia, Code 1961, Title 29 [Business Organizations] is patterned after the Model Business Corporation Act.").

[7] *Model Act*, at ix.

[8] Lewis S. Black, Jr., *Why Corporations Choose Delaware* (Delaware Department of State Division of Corporations, 2007).

[9] 1 R. Franklin Balotti and Jesse A. Finkelstein, *The Delaware Law of Corporations and Business Organizations*, at F-1 (2008 Supp.).

[10] *See* Michael P. Dooley & Michael D. Goldman, *Some Comparisons Between the Model Business Corporation Act and the Delaware General Corporation Law*, 56 BUS. LAW. 737 (2001) (stating, with respect to the Model Act and the DGCL, that "[i]t is entirely fitting that the two most influential corporation law statutes in the United States have reached significant mileposts .... Although the influence of both statutes on the development of American corporation law is indisputable, the contributions of each has come in a slightly different form.").

provide no guidance as to why the proposed standard for a reasonable person is "based on societal requirements for the protection of the general interest," the supplementary information included in the Proposed Rules indicates that the proposed definition is "based on use of the term in conflict-of-interest proceedings and substantially resembles the legal meaning of [the] term."[11]

To the extent the FCA wishes to codify a "reasonable person" standard, the proposed definition has the potential of introducing significant confusion and uncertainty regarding the standard of care against which a director's conduct would be measured. The meaning of "societal requirements for the protection of the general interest" would be a novel corporate governance concept not contemplated or defined by established corporate governance principles, as the proposed standard finds no support under the Model Act, Delaware law or the D.C. Code.[12]

The Model Act articulates the standard of care for directors to be "the care that a person in a like position would reasonably believe appropriate under similar circumstances."[13] As the commentary to the Model Act explains, directors often make a decision from a range of options,[14] and any choice within the realm of reason would be an appropriate decision satisfying the standard of care delineated in the Model Act.[15] Whether a given decision falls within the realm of reason should be judged from the perspective of a director of the particular corporation, in view of the particular director's specific background, qualifications, and management responsibilities.

The proposed definition of "reasonable person" also deviates from the commonly understood articulation of the standard of care imposed on corporate fiduciaries. In our view, the inclusion of the term "average" and the phrase "societal requirements" fails to establish the fact-specific standard of care that the Model Act and the corporate governance laws of Delaware and the District of Columbia have adopted. Moreover, the phrase "for the protection of the general interest" diverges from what established corporate governance standards treat as fundamental to basic standards of conduct for all directors. Rather than a pursuit to serve "the general interest," a corporate director is charged with protecting the best interests of the corporation and its stockholders.[16] Although it is generally permissible as a matter of corporate governance to consider the interests of non-stockholder constituencies, the board of directors should be charged with the authority to determine whether, and to what extent, consideration of non-stockholder interests is appropriate on a case-by-case basis.[17] In light of the well-established standards of care that have

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[11] 80 Fed. Reg. at 15935.

[12] Under Delaware law, the standard of care to which corporate directors are held is that degree of care and prudence that would be expected of them in the management of their own affairs.

[13] *Model Act* § 8.30(b). *See also* D.C. Code § 29-306.30(b) ("The members of the board of directors ... shall discharge their duties with the care that a person in a like position would reasonably believe appropriate under similar circumstances.").

[14] *Model Act* § 8.30(b) cmt. 2.

[15] *Id.*

[16] *See Model Act* § 8.30(a) (requiring a director to discharge duties "in a manner the director reasonably believes to be in the best interests of the corporation"); D.C. Code § 29-306.30(a)(2) (same language as the Model Act); *Smith v. Van Gorkom*, 488 A.2d 858, 872 (Del. 1985) (explaining that directors of Delaware corporations have an unyielding fiduciary duty to protect the interests of the corporation and to act in the best interests of the corporation and its stockholders).

[17] In Delaware, for instance, the impact on constituencies other than stockholders (*i.e.*, creditors, customers, employees,

been articulated in the Model Act, as well as other credible state law sources reflecting established corporate governance standards, we believe it would be inadvisable for the FCA to introduce a novel and untested meaning for "reasonable person."[18] As noted above, good corporate governance has been developed to provide clarity, consistency and predictability – not to inject confusion and uncertainty that impedes decision-making.

Moreover, the proposed definition of "reasonable person" could effectively broaden Farmer Mac's corporate mission beyond what Congress intended when it formed Farmer Mac. Congress formed Farmer Mac for the purpose of establishing a secondary market for specified types of loans to increase the availability of long-term credit at stable interest rates to borrowers in rural America.[19] That specific public policy mission is also referenced in the supplementary information included in the Proposed Rules. Yet, the standard contained in the proposed "reasonable person" definition is measured by a concern for protecting "the general interest." This would impose upon Farmer Mac's directors an obligation to consider additional constituency groups and types of interests in the exercise of their fiduciary duties. The phrase "protection for the general interest" within the proposed definition of "reasonable person" is extremely broad and open-ended and, arguably, expands Farmer Mac's public policy purpose in a manner that is inconsistent with its Congressionally-mandated corporate mission of serving America's agricultural and rural communities.

Indemnification (Proposed 12 C.F.R. § 651.2, Subpart A)

Proposed section 651.2(a) provides that Farmer Mac "must have policies and procedures in place before it may offer indemnification insurance to its directors, officers, or employees," and "must consider all sources of potential indemnification to protect [Farmer Mac] against over-indemnification of an individual director or officer."

Both the Model Act and the DGCL provide for permissible indemnification to the extent a director's actions meet certain standards of conduct specified therein.[20] In addition, Article VIII, Section 1 of the Farmer Mac by-laws (the "by-laws") requires Farmer Mac to indemnify and hold

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and the community generally) is within a board of director's sound business judgment to the extent such interests are "rationally related" to furthering the interests of the stockholders. *See Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 176 (Del. 1986) (indicating that board can consider interests of other constituencies if they are rationally related to furthering the interests of stockholders).

[18] The uncertainty surrounding the proposed meaning of "reasonable person" would be further perpetuated if it were to be included in the definition of "material," as the FCA has proposed. Corporate governance principles dictate a materiality standard for purposes of the fiduciary duty of loyalty that is subjective, not objective. *Cinerama, Inc. v. Technicolor, Inc.*, 663 A.2d 1156, 1167–69 (Del. 1995) (affirming that the "subjective 'actual person' standard" and not an "objective 'reasonable person' formulation" is the appropriate standard for determining whether a director's financial interests are material).

[19] 80 Fed. Reg. at 15932. *See id.* ("Farmer Mac was established ... to create a secondary market for agricultural real estate mortgage loans, rural housing mortgage loans, rural utility cooperative loans, and the guaranteed portions of USDA-guaranteed farm and rural development loans.").

[20] *See Model Act* § 8.51; *see also* 8 *Del. C.* § 145. The commentary to the Model Act states that, although a corporation may elect in its formation documents to indemnify directors to the maximum extent permitted by applicable law (as in the case of Farmer Mac), conduct that fails to meet the standards specified in the Model Act is not eligible for permissive indemnification. *Model Act* § 8.51(a), cmt. 1.

harmless Farmer Mac's directors against any threatened, pending or completed proceeding "to the fullest extent permitted by applicable law." Although the Proposed Rules contemplate the implementation of specific policies and procedures regarding indemnification "in the interest of safety and soundness,"[21] we note that Farmer Mac's by-laws already contain detailed provisions governing the indemnification of Farmer Mac's directors. These provisions are not only consistent with the language contained in both the Model Act and the DGCL but are also substantially similar to what we view as common, if not "boilerplate," provisions in the bylaws of a publicly traded, NYSE-listed company. The procedures provided for in Farmer Mac's by-laws include, among other things, an assessment of whether indemnification is authorized in connection with a particular type of proceeding, whether the person seeking indemnification has satisfied the applicable standard of conduct, and whether the amounts to be indemnified were actually incurred.[22] Over the years, these procedures have been subjected to extensive judicial interpretation, particularly in the Delaware Courts, and, due to the well-developed case law in Delaware regarding the indemnification of directors, there is little ambiguity and uncertainty as to what these procedures intend. Accordingly, we believe it is unnecessary and inadvisable from a corporate governance standpoint for the FCA to impose an additional layer of prescriptive regulatory requirements on the Farmer Mac Board to adopt specific policies and procedures beyond the well-understood and frequently tested procedures already contained in Farmer Mac's by-laws. We believe that regulatory requirements related to director indemnification would only result in confusion and uncertainty as to the indemnification rights that are provided to directors and would be inconsistent with the salutary public policy that is served by indemnification, namely attracting the most capable individuals into corporate service and encouraging them to accept positions of responsibility and to make good faith decisions without fear of undue penalty.

We note further from the standpoint of established corporate governance principles that the term "over-indemnification" is not contemplated, defined or otherwise addressed by the Model Act, the DGCL, or the D.C. Code. While the Proposed Rules state that proposed regulations relating to indemnification are intended to ensure the implementation of "adequate controls over indemnification practices in order to prevent unintended consequences such as over-indemnification," the meaning of the term "over-indemnification" remains unclear as a matter of statutory or common law. In addition, the requirement under the Proposed Rules for Farmer Mac to consider "all sources of potential indemnification" creates further uncertainty and confusion in practical application. Recognizing that this section of the Proposed Rules may be intended to avoid potential duty of loyalty issues by limiting third-party indemnification arrangements for Farmer Mac directors who may also be "representative" directors, we think it would be advisable for Farmer Mac to require directors to disclose the material terms of any third-party indemnification arrangements to the Farmer Mac Board, or an appropriate committee thereof, on a periodic basis, which we understand is Farmer Mac's current practice. This approach would be consistent with a director's fiduciary duty of full and candid disclosure, as opposed to introducing a novel and

[21] 80 Fed. Reg. at 15938 (March 26, 2015).

[22] *See Jana Master Fund, Ltd. v. CNET Networks, Inc.*, 954 A.2d 335, 338 (Del. Ch. 2008) (noting that "a corporation's bylaws and charter are contracts among its shareholders"); *see also Gow v. Consol. Coppermines Corp.*, 165 A. 136, 140 (Del. Ch. 1933) (stating that "the by-laws of a corporation have been characterized as the proper place to set forth 'the self-imposed rules and regulations deemed expedient ... for the ... convenient functioning' of the corporation"); *Boilermakers Local 154 Ret. Fund v. Chevron Corp.*, 73 A.3d 934 (Del. Ch. 2013).

untested regulatory requirement that the Farmer Mac Board "consider" such sources of third-party indemnification when potential indemnification issues arise.

Conflict-of-Interest Policy (Proposed 12 C.F.R. § 651.22, Subpart B)

Proposed section 651.22 would require Farmer Mac to maintain a conflict-of-interest policy designed in part to provide reasonable assurance that directors, officers, employees, and agents of Farmer Mac discharge their responsibilities in a "business-like manner." The Proposed Rules do not define the meaning of "business-like." Moreover, from the standpoint of established corporate governance principles, a "business-like" standard is a novel and untested standard and one not contemplated or defined in the Model Act, the DGCL, or the D.C. Code. In the absence of any commonly understood meaning of "business-like," such a standard would result in confusion and uncertainty and Farmer Mac would be without any practical guidance regarding the implementation of a conflict-of-interest policy that satisfies this ambiguous standard.

Proposed section 651.22's treatment of "representative" directors is also inconsistent with the recognized and established fiduciary duty principles articulated under the Model Act and Delaware law. First, proposed section 651.22(a) would require Farmer Mac to adopt a conflict-of-interest policy to "acknowledge and respect the representational affiliations required by the Act for elected directors." Yet, the Proposed Rules do not provide any guidance for how to handle situations where the interests of one class of Farmer Mac stockholders conflicts with the interests of another class of stockholders, and language contained in the Proposed Rules is inconsistent with the supplementary information included in the Proposed Rules relating to director fiduciary duties.[23] Delaware case law has consistently rejected the notion that a director appointed by a particular class of stockholders can or should serve the particular interests of the appointing entity as opposed to the interests of the stockholder body as a whole.[24] Moreover, the ability of a stockholder or group of stockholders to elect directors to the board is not accompanied by the power to undermine a director's independence.[25] Directors are responsible for protecting the best interests of the corporation and all of its stockholders, despite a director's election or appointment by a particular constituency.

We strongly advise that any additional corporate governance regulations that the FCA seeks to impose on Farmer Mac not deviate from the established bedrock corporate governance principles that require a director to act in the best interests of the corporation and all of its stockholders. Neither the Model Act nor Delaware law recognizes any special duty on the part of directors elected by a special class to the class electing them. Moreover, established corporate governance standards require a director who has a conflict of interest relating to a proposed transaction to recuse himself

[23] 80 Fed. Reg. at 15938 (stating that "[t]he proposed provisions are intended to ensure that all directors, regardless of how they acquired their seats on the board of directors, understand that they are bound by their fiduciary duty to Farmer Mac and, as a result, act for the betterment of Farmer Mac overall and not any particular group of shareholders or investors").

[24] *Klaassen v. Allegro Dev. Corp.*, 2013 WL 5967028, at *12 (Del. Ch. Nov. 7, 2013).

[25] *Aronson v. Lewis,* 473 A.2d 805, 815–16 (Del. 1984).

or herself from all board deliberations and discussions regarding the transaction, and directors generally abstain from participating in any board determination with respect thereto.[26]

In addition, proposed section 651.22(b) would exclude from the analysis of potential conflicts-of-interest those interests arising by virtue of "the organization or entity [being] directly connected to the representational affiliations required by the Act for elected directors." This new carve out likely codifies the recurrence of divided loyalties in that the fiduciary duties owed to Farmer Mac could conflict with fiduciary duties owed to another corporation or other entity. An unambiguous conflict-of-interest policy is of paramount importance in the context of dual fiduciaries. A dual fiduciary could otherwise find himself or herself in a situation where his or her duties to two entities are in direct conflict and no course of action is in the best interests of both entities. This puts the director in an untenable position of having to breach fiduciary duties owed to one entity in order to satisfy fiduciary duties owed to another. Any regulatory scheme that has the effect of codifying such a conundrum would be inconsistent with established corporate governance standards.

In the case of a dual fiduciary, conflicts of interest most frequently arise when a transaction involving the two corporations that share a common fiduciary is undertaken. In this type of transaction, the dual fiduciary stands on both sides of the transaction and is clearly interested.[27] Because dual fiduciaries must disclose to each corporation they serve in a fiduciary capacity any information they have developed or uncovered that would be beneficial to the corporation in its business but may not divulge any confidential corporate information they receive, their fiduciary obligations owed to one corporation may conflict with obligations owed to another.[28]

Under Delaware law, "a director is deemed conflicted whenever divided loyalties are present."[29] Moreover, when the divided loyalties are a result of a director standing on both sides of a transaction that is later challenged by a stockholder, a conflict of interest is deemed to exist under Delaware law regardless of materiality.[30] The fact that the fiduciary may owe duties to another entity does not mitigate or lessen the fiduciary's duty. Although dual or multiple positions are permissible under Delaware law, the dual fiduciary cannot use an additional fiduciary position as a device for diluting fiduciary duties owed to others.[31] Instead, he or she should be charged with an

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[26] *See Weinberger v. UOP, Inc.*, 457 A.2d 701, 711 (Del. 1983).

[27] Additionally, a potential conflict may arise where one corporation is considering a transaction with a third party that may, directly or indirectly, be detrimental or beneficial to the other corporation served by a common fiduciary. Another common scenario where conflicts arise is when, by serving as a fiduciary of one corporation, the dual fiduciary comes into the possession of confidential information that is material to the other corporation. This may pose a conflict because the fiduciary duties of care and loyalty require directors to keep corporate information confidential. *See, e.g., Hollinger Int'l, Inc. v. Black*, 844 A.2d 1022, 1061–62 (Del. Ch. 2004), *aff'd*, 872 A.2d 559 (Del. 2005) (finding that a director breached the duty of loyalty by improperly using and sharing corporate information).

[28] *See Weinberger*, 457 A.2d at 708; *see also Int'l Equity Capital Growth Fund, L.P. v. Clegg*, 1997 WL 208955 (Del. Ch. Apr. 21, 1997).

[29] *In re Freeport-McMoRan Sulphur, Inc. S'holder Litig.*, 2005 WL 1653923, at *7 (Del. Ch. June 30, 2005) (quoting *Jacobs v. Yang*, 2004 WL 1653923, at *8 (Del. Ch. Aug. 2, 2004)).

[30] *See Orman v. Cullman*, 794 A.2d 5, 25 n.50 (Del. Ch. 2002); *Cinerama, Inc. v. Technicolor, Inc.*, 663 A.2d 1156, 1167 (Del. 1995); *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 363–64 (Del. 1993).

[31] *Levien v. Sinclair Oil Corp.*, 261 A.2d 911, 915 (Del. Ch. 1969), *aff'd in part, rev'd in part on other grounds*, 280 A.2d 717 (Del. 1971).

"unyielding fiduciary duty" to each entity and its stockholders.[32] Thus, a dual fiduciary should owe the same duty of good management to both entities.[33] This view is shared by both the Model Act and the District of Columbia.[34]

We caution that the FCA's proposal to carve out dual fiduciaries from the analysis of potential conflicts-of-interest will likely have unintended consequences. First, given that this approach has not been adopted by the Model Act, the State of Delaware, or the District of Columbia, Farmer Mac will not have the benefit of alternative legal sources for guidance on how to construct, implement, and enforce a conflict-of-interest policy. Perhaps even more inimical to Farmer Mac, the approach reflected in proposed section 651.22 for ignoring conflicting interests of certain organizations—*i.e.*, those which are "directly connected to the representational affiliations"—fails to consider that the approach may not, and likely will not, be consistent with the conflict-of-interest policy adhered to by the other organization to which a director owes a fiduciary duty. The other organization might have in place a conflict-of-interest policy consistent with established corporate governance principles, imposing on each director unyielding fiduciary duties that are undiluted by virtue of such director's service on another organization's board of directors.

Established corporate governance principles do not dictate having a conflict-of-interest policy that deems conflicts arising from divided loyalties as a *per se* breach of fiduciary duties. Rather, it is the manner in which interested fiduciaries address conflicts and the processes they invoke to ensure fairness to the corporation and its stockholders that should determine the propriety of the fiduciaries' conduct. This underscores the importance of Farmer Mac having clear guidance in place for its directors to identify the preventative measures required to avoid a situation where a director is unable to satisfy the fiduciary duties owed to Farmer Mac and another entity.

Director, Officer, Employee, and Agent Responsibilities (Proposed 12 C.F.R. § 651.24, Subpart B)

Proposed section 651.24 replaces the requirement for directors, officers, employees, and agents to maintain high standards of behavior with specifically enumerated prohibitions on conduct. Specifically, section 651.24 prohibits any director, officer, employee, or agent of Farmer Mac from making "any untrue or misleading statement of material fact intended or having the effect of reducing public confidence in [Farmer Mac]" and making "improper use of official [Farmer Mac] property or information." The Proposed Rules would also prohibit any director from divulging or using, outside the performance of official duties, "any fact, information, or document that is acquired by virtue of serving on the board of [Farmer Mac] and not generally available to the public."

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[32] *Van Gorkom*, 488 A.2d at 872; *see also Sealy Mattress Co. of New Jersey, Inc. v. Sealy, Inc.*, 532 A.2d 1324, 1338 (Del. Ch. 1987) (holding a dual fiduciary has "an affirmative duty to protect the interests of the minority" and cannot "abdicate its obligation to make an informed decision on the fairness of [a transaction] by simply deferring to the judgment of the controlling stockholder, particularly where ... the majority stockholder's interests were in unalloyed conflict with the minority").

[33] *Weinberger v. UOP, Inc.*, 457 A.2d 701, 710 (Del. 1983); *Levien*, 261 A.2d at 915.

[34] *See Model Act* § 8.62(b) cmt. 2 (explaining the procedures to be followed by a director with a conflicting interest who is not able to comply fully with their fiduciary duty of disclosure, noting that such conflicts are most likely to arise in the case of dual fiduciaries).

A director's fiduciary duty of disclosure obligations are clearly defined in both the Model Act and by Delaware case law. Under the Model Act, a director's obligation to disclose material information to the board is subsumed within Sections 8.30(a) and 8.30(b), which delineates the standard of conduct for directors.[35] Section 8.30(c) of the Model Act also recognizes that a director's duty of confidentiality may, under certain circumstances, override his or her obligation to disclose material information to other directors. In those instances, however, the Model Act states that a director who withholds material information based upon a duty of confidentiality should typically advise other members of the board of the nature of such duty.[36] Section 8.62 of the Model Act further specifies additional disclosures that must be made in circumstances involving a director conflict of interest transaction, while the requirements specified under Section 8.30(c) apply generally to all other board decisions.[37]

Under Delaware law, a combination of the fiduciary duties of care and loyalty gives rise to the fiduciary obligation of directors to be candid in the course of communicating publicly or directly with stockholders.[38] When seeking stockholder action, directors have a fiduciary obligation to disclose fully and fairly all material information within the board's control to the stockholders. As a Delaware law matter, a fact is "material" if there is a substantial likelihood that a reasonable stockholder would consider it important in deciding how to vote or whether to tender shares in a tender offer.[39] As noted above, the Delaware courts assess materiality from the viewpoint of the "reasonable stockholder, not from a director's subjective perspective."[40] Directors must provide balanced, truthful accounts of all matters disclosed in communications to stockholders.[41] Those obligations attach to proxy statements and other disclosures that contemplate stockholder action.[42]

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[35] *Model Act* §8.30(c) cmt. 3.

[36] *Id.*

[37] *Id.*

[38] *Malone v. Brincat*, 722 A.2d 5, 10 (Del. 1998); *Zirn v. VLI Corp.*, 621 A.2d 773, 778 (Del. 1993). As the Delaware courts have noted, "[d]irectors are required to provide shareholders with all information that is material to the action being requested and to provide a balanced, truthful account of all matters disclosed in the communications with shareholders. Accordingly, directors have definitive guidance in discharging their fiduciary duty by an analysis of the factual circumstances relating to the specific shareholder action being requested and an inquiry into the potential for deception or misinformation." *See Malone*, 722 A.2d at 5; *see also Wis. Ave. Assocs., Inc. v. 2720 Wis. Ave. Coop. Ass'n*, 441 A.2d 956, 962-63 (D.C. 1982) (stating that "promoters of a corporation stand in a fiduciary relation to both the corporation and its stockholders, which requires them to act with the utmost good faith and to disclose fully all material facts to both the corporation and its stockholders.").

[39] *See, e.g., Bershad v. Curtiss-Wright Corp.*, 535 A.2d 840 (Del. 1987); *see also In re Answers Corp. S'holders Litig.*, 2011 WL 1366780, at *5 (Del. Ch. Apr. 11, 2011) (internal quotations omitted) (citing *Gantler v. Stephens*, 965 A.2d 695, 710 (Del. 2009)) (noting that materiality exists if there is a substantial likelihood that "the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available.").

[40] *In re Cogent, Inc. S'holder Litig.*, 7 A.3d 487, 510 (Del. Ch. 2010).

[41] *See, e.g., Malone*, 722 A.2d at 12; *Arnold v. Soc'y for Sav. Bancorp, Inc.*, 650 A.2d 1270, 1277 (Del. 1994); *Zirn*, 621 A.2d at 778.

[42] *Arnold*, 650 A.2d at 1277.

"A director may be barred from access to corporate information if his motives are improper or are in derogation of the corporate interest."[43]

Given the established delineation of director disclosure obligations in both the Model Act and under Delaware law, we would not impose undefined and ambiguous disclosure obligations on the directors of Farmer Mac, particularly with respect to the dissemination of "a material fact intended or having the effect of reducing public confidence in the corporation." The meaning of a statement that results in a reduction in "public confidence" is unclear under established corporate governance standards, and the concept of reducing public confidence in a corporation is neither contemplated nor addressed by the Model Act or the DGCL. We note further that the disclosure obligations of Farmer Mac directors would be deemed far broader than disclosures that have the effect of "reducing public confidence" in Farmer Mac under established corporate governance principles.

Similarly, as noted above, both the Model Act and the DGCL would proscribe any actions taken by a Farmer Mac director to make improper use of information gained by a director in the course of his or her service on the Board, including information used for personal profit or to aid a third party holding a position adverse to the corporation.[44] In our view, it is therefore unnecessary and inadvisable for the FCA to replace the standards of conduct for directors reflected in Farmer Mac's existing regulations with an undefined and untested standard. To the extent the FCA wishes to codify a standard of conduct for Farmer Mac directors, our recommendation would be for the FCA to adopt a credible standard such as the Model Act, or to select a specific jurisdiction such as Delaware or the District of Columbia to govern issues related to Farmer Mac's corporate governance, in order to provide greater certainty regarding the manner in which director conduct would be measured.[45]

Director Elections (Proposed 12 C.F.R. § 651.30)

Proposed section 651.30(c) presents issues that create confusion and uncertainty concerning representational directors. The proposed new provisions provide that director elections must "acknowledge and respect the voting rights of Class A and Class B stockholders, as well as the elected director representational affiliations required by the Act." While the concept of respecting the voting rights of certain classes of stockholders is consistent with well-accepted principles of corporate governance,[46] it is unclear what must be acknowledged and respected in regards to the "the elected director representational affiliations required by the Act." Specifically, the language could be read as acknowledging some sort of standalone right with respect to the elected director representational affiliations that is separate and apart from the voting rights of the stockholders. The vague language contained in proposed section 651.30(c), coupled with the absence of any

[43] 1 Edward P. Welch, Robert S. Saunders and Jennifer C. Voss, *Folk on the Delaware General Corporation Law*, § 141.02, at 4-40 (2014-3 Supp.) (noting further that "[a] director's duties include a duty to protect corporation information.").

[44] *See, e.g., Brophy v. City Service Co.*, 70 A.2d 5, 8 (Del. Ch. 1949); *Shocking Techs., Inc. v. Michael*, 2012 WL 4482838, at *9 (Del. Ch. Oct. 1, 2012).

[45] *Model Act*, at ix.

[46] *See Model Act* § 8.04; *see also* 8 *Del. C.* § 141(d); D.C. Code § 29-306.04.

common law background for clarity, would leave Farmer Mac without guidance on how to comply with its obligations with respect to director elections.

Moreover, proposed section 651.30(c) would codify a qualification requirement for serving on Farmer Mac's board of directors, providing that "[e]lected director candidates must have a recognized affiliation or relationship with their respective class of voting stockholders at the time of nomination and election." The FCA appears to take the view that this is required by the inclusion of the term "representative" in Farmer Mac's statutory charter (the "Charter"), interpreting the term to mean that at the time of nomination and election, a Farmer Mac director nominee must have an "official affiliation" with the relevant class of stockholders that is "close" and "substantial and visible."[47] We view the FCA's interpretation as problematic in two key respects.

First, the FCA's interpretation is not supported by the plain language of the Charter. Under the Charter, if a director "elected to the permanent board from among persons who are representatives of banks, other financial institutions or entities, insurance companies, or Farm Credit System institutions ceases to be such a representative," the director may continue to serve on the Board for not longer than 45 days after the director "ceases to be such a representative."[48] Given the three-class structure of the Farmer Mac Board, it seems unlikely that the "representative" nature of the Board is accomplished simply by a director having an "official affiliation" with any one stockholder entity. This conclusion is further supported by the use of the term "representatives" in Section 8.2(b)(2)(C) of the Charter, which provides that the five directors appointed by the President must be "representatives of the general public." Because nothing in the Charter suggests that the term "representatives" was intended to have a different meaning in the context of a President-appointed director, we believe that the "representative" nature of the Board was intended to be achieved simply by permitting each of the two classes of stockholders to nominate and elect its designated five members to the Board.

Second, codifying a representational affiliation requirement would function as a restriction on the right of Farmer Mac stockholders to nominate and elect directors. As a general matter, the Model Act as well as the DGCL and the D.C. Code each recognize the propriety of imposing reasonable qualifications to serve as a member of a corporate board of directors.[49] However, to the extent the proposed director qualification disenfranchises Class A and/or Class B stockholders by divesting them of their right to vote on the election of directors, it would be inconsistent with established corporate governance principles. For instance, Delaware law recognizes that the "right of shareholders to participate in the voting process includes the right to nominate...."[50] Under Delaware law, the right to vote on the election of directors is a "fundamental power" of stockholders and constitutes the "ideological underpinning upon which the legitimacy of directorial power rests."[51] In our view, the representative nature of the Board should be accomplished as a

[47] 80 Fed. Reg. at 15935 n.15 & 15937.

[48] 12 U.S.C. § 2279aa-2(b)(5).

[49] *See Model Act* § 8.02; *see also* 8 *Del. C.* § 141(b); D.C. Code § 29-306.02 (same language as Model Act).

[50] *Harrah's Entm't, Inc. v. JCC Holding Co.*, 802 A.2d 294, 310–12 (Del. Ch. 2002) (quoting *Linton v. Everett*, 1997 WL 441189, at *9 (Del. Ch. July 31, 1997)); *see also Hubbard v. Hollywood Park Realty Enters., Inc.*, 1991 WL 3151, at *11 (Del. Ch. Jan. 14, 1991) (recognizing "the fundamental nature of the shareholders' right to exercise their franchise, which includes the right to nominate candidates for the board of directors").

[51] *Harrah's*, 802 A.2d at 310.

corporate governance matter by permitting stockholders to elect freely the directors of their own choosing.

Director Fiduciary Duties (Proposed 12 C.F.R. § 651.40(c))

Proposed section 651.40 sets out the general responsibilities of the Farmer Mac Board, including director fiduciary duties. Although the Proposed Rules reference various established corporate governance concepts, including the requirement for Farmer Mac directors to carry out their duties in good faith and in a manner in which directors believe are in the best interests of the corporation, this section of the Proposed Rules introduces novel concepts that are inconsistent with established corporate governance standards, including the Model Act, the DGCL and the D.C. Code. For example, proposed section 651.40 provides that each director must "administer the affairs of the Corporation fairly and impartially without discrimination in favor of or against any investor, stockholder, or class of stockholders." As discussed above with respect to the FCA's proposed conflict-of-interest policy, both the Model Act and Delaware law provide credible and practical guidelines for director conduct, including with respect to a director's fiduciary duties. Neither the Model Act nor Delaware law, however, recognizes the concept of directors acting "fairly and impartially without discrimination" in favor of an investor, stockholder or class of stockholders. Rather, in carrying out their responsibilities, directors have an unyielding fiduciary duty to protect the interests of the corporation and to act in the best interests of the corporation and its stockholders.[52] Delaware courts include within the concept of unyielding fiduciary responsibility the duties of due care and loyalty.[53]

Section 8.03(a) of the Model Act similarly delineates a standard of conduct requiring directors to act in good faith and with a reasonable belief that a contemplated action in the best interests of the corporation. As the commentary to the Model Act notes:

> [A director's] mandate governs all aspects of directors' duties: the duty of care, the duty to become informed, the duty of inquiry, the duty of informed judgment, the duty of attention, the duty of loyalty, the duty of fair dealing and, finally, the broad concept of fiduciary duty that the courts often use as a frame of reference when evaluating a director's conduct. These duties do not necessarily compartmentalize and, in fact, tend to overlap.[54]

Consistent with our prior comments, we would urge the FCA not to impose new regulations on Farmer Mac that contain novel and untested concepts of corporate governance and undefined terms such as "without discrimination" that are neither contemplated nor recognized by established common law and state statutory regimes, including the Model Act, Delaware Law, and the D.C. Code. The concept, if it is one of "discrimination," is not a defined term of art in corporate law, and its interjection here fosters unwarranted confusion, speculation and unnecessary uncertainty. As a corporate governance matter, a director's obligation to consider the interests of *all* of the corporation's stockholders equally, regardless of whether a director is elected by a designated class of stockholders, remains implicit in a director's "unyielding" fiduciary duty of loyalty." As

[52] *E.g., Van Gorkom*, 488 A.2d at 872; *Guth v. Loft, Inc.*, 5 A.2d 503, 510 (Del. 1939).

[53] *Malone*, 722 A.2d at 10.

[54] *Model Act* § 8.30(a) cmt. 1.

discussed above, even in the context of dual fiduciaries, both the Model Act and Delaware law provide guidelines for addressing potential conflicts arising from the service of a director serving on more than one board.[55]

Director "Independence" (Proposed 12 C.F.R. § 651.40(d))

Proposed section 651.40(d) further states with respect to director "independence" that the FCA would not allow "confidentiality agreements or [Farmer Mac] policies and procedures" to prevent directors from "publicly or privately commenting orally or in writing on non-private or non-privileged corporate business and related matters."

In keeping with our comments to proposed section 651.40(c), proposed section 651.40(d) introduces new undefined terms, including "non-private" and "non-privileged," that are not contained in or addressed by the Model Act or as a matter of Delaware law. The Model Act sets forth a standard for director conduct with respect to independence at Section 8.31(a)(2)(iii), stating in part that a director lacks independence "due to the director's familial, financial or business relationship with, or a lack of independence due to the director's domination or control by, another person having a material interest in the challenged conduct."[56] In evaluating potential director conflicts, the Delaware courts similarly focus on a director's disinterestedness and independence with respect to a contemplated action, and as a general matter, a director is considered independent if his or her "decision is based on the corporate merits of the subject before the board rather than extraneous considerations or influences."[57]

Given the approach taken by the Model Act and Delaware law with respect to establishing director independence, it is unclear from the Proposed Rules how broadly or narrowly the undefined terms "non-private" and "non-privileged" with respect to corporate information would be interpreted. Moreover, in the absence of guiding principles from an existing common law or statutory regime, it is uncertain how Farmer Mac would determine as a practical matter whether the terms of its existing confidentiality agreements conform to the language contained in proposed section 651.40(d). As a general matter, the Proposed Rules would impose standards for determining independence that are inconsistent with established corporate governance principles, including the DGCL, which as noted above is an enabling statute "written with a bias against regulation ... [with] every effort made to simplify drafting and to avoid complexity."[58] The supplementary information included in the Proposed Rules indicates that the FCA's proposed independence standards are intended to "allow directors to converse with stockholders as a means of gathering information, gaining insights into stockholder wishes, and demonstrating accountability."[59] In our view, however, the proposed regulations, as drafted, are unduly prescriptive and interfere with the broad authority granted to directors under established common law and enabling statutes, including the Model Act, the DGCL and the D.C. Code. In light of these drafting ambiguities, and consistent

[55] *See Levien*, 261 A.2d at 911; *see also Model Act* § 8.62.

[56] *See Model Act* § 8.31(a)(2)(iii).

[57] *Aronson*, 473 A.2d at 816.

[58] Lewis S. Black, Jr., *Why Corporations Choose Delaware* at 2 (Delaware Department of State Division of Corporations, 2007).

[59] 80 Fed. Reg. at 15938.

with our prior comments regarding undefined terms contained in the Proposed Rules that do not comport with established and recognized corporate governance standards, it would be inadvisable for the FCA to impose the new fiduciary duty obligations for Farmer Mac directors reflected in proposed section 651.40(d).

Committees of the Corporation's Board of Directors (Proposed 12 C.F.R. § 651.50)

Proposed section 651.50 specifies that "[n]o committee of the board of directors shall relieve the board of directors or any board member of a responsibility imposed by law or regulation," places certain membership requirements on Board committees, and establishes procedural requirements for Board committees, such as meeting agendas and minutes. In our view, the proposed revisions are inconsistent with well-established corporate governance principles specified in the Model Act, the DGCL and the D.C. Code, each of which provides broad authority to a board of directors to establish, oversee and delegate authority to committees, and with the explicit authority granted to the Board in the by-laws.[60]

The Model Act provides that, unless otherwise restricted in a corporation's formation documents, a board of directors may create committees and appoint one or more members of the board of directors to serve on any such committee.[61] Subsection 8.30(f)(3) of the Model Act further permits the board to rely on a board committee when a committee submits a recommendation for action to the full board or when a committee performs "supervisory or other functions where neither the full board of directors nor the committee take dispositive action."[62] The DGCL similarly grants broad authority for a board of directors to establish and delegate authority to committees consisting of one or more directors, and states that a committee may exercise "all the powers and authority of the board of directors" as specified in the resolutions appointing the committee, subject to certain exceptions specified in the DGCL.[63] Under the DGCL, in discharging their fiduciary duties, directors may also rely upon information, opinions, reports or statements provided by committees of the board to the full board so long as the subject matter provided to the board is within the committee's professional expertise.[64]

Given the broad authority granted to a board of directors under the Model Act and the DGCL to establish and delegate authority to committees as a matter of the board's sound business

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[60] Article V, Section 10 of Farmer Mac's by-laws designates a number of standing committees of the Board, while Article V, Section 11 of the by-laws authorizes the Board, by resolution adopted by a majority of the Farmer Mac Board, to "designate one or more ad hoc committees, each of which to the extent provided in the resolution and in these By-Laws, shall have any and may exercise all the authority of the Board of Directors."

[61] *Model Act* § 8.25(a).

[62] *Model Act* § 8.30(c) cmt. 3 ("A director complying with the standard of care expressed in Section 8.30(b) is entitled to rely (under subsection (c)) upon board functions performed pursuant to delegated authority by, and to reply ... upon information, opinions, reports or statements ... provided by, the persons or committees specified in the relevant parts of subsection (e).").

[63] *See* 8 *Del. C.* § 141(c)(1). *See also Model Act* § 8.25 cmt. (noting that Section 8.25(e) of the Model Act prohibits the delegation of authority with respect to "most mergers, sales of substantially all the assets, amendments to articles of incorporation and voluntary dissolution since these require shareholder action"). The D.C. Code contains similar language tracking the Model Act (*see* D.C. Code § 29-306.30).

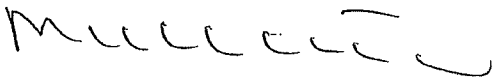
[64] *See* 8 *Del. C.* § 141(e).

judgment,[65] language contained in proposed section 651.50 stating that "no committee of the board of directors shall relieve the board of directors or any board member of a responsibility imposed by law or regulation" conflicts with well-established principles of corporate governance including the Model Act and the DGCL. In addition, the procedural aspects of proposed section 651.50 appear overly prescriptive in light of existing common law and statutory regimes and broad rights granted to the Board under the by-laws, as well as the absence of specific language contained in the Charter. We note further that proposed section 651.50(c), subsections (1) and (2), place undue restrictions on the Board's business judgment with respect to determining the Board members best qualified to serve on a Standing or Ad Hoc Committee of the Board. Subsections (1) and (2) may also require the Board as a regulatory matter to appoint a Farmer Mac director to a committee of the Board when such director could potentially have a conflict-of-interest, a proposition diametrically opposed to established corporate governance standards, including the Model Act, Delaware law and the D.C. Code.

IV. Conclusion

Thank you for the opportunity to provide these comments. Please feel free to contact me if you have any questions or if you wish to discuss this letter further. I can be reached at 302-984-6030.

Very truly yours,



Myron T. Steele

cc: Farmer Mac Board of Directors
Stephen P. Mullery, Senior Vice President – General Counsel

[65] 1 David A. Drexler, Lewis S. Black, Jr. and A. Gilchrist Sparks, III, *Delaware Corporation Law and Practice*, §13.01[9], at 13-19 (2014) (stating that "[t]he authority granted to a board to delegate its functions is very broad.").

Annex A

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EDUCATION

B.A. Foreign Affairs, University of Virginia, 1967
J.D., University of Virginia Law School, 1970
LLM, University of Virginia, 2005
Hon. D. L.D., University of Delaware, 2014

BAR ADMISSIONS

Admitted to Virginia & Delaware Bars, 1970
Admitted to practice in U.S. District Court, January 19, 1973
Admitted as Member of the Bar of the U.S. Supreme Court, June 4, 2007

PROFESSIONAL EXPERIENCE

Partner, Potter Anderson & Corroon LLP, Jan. 15, 2014 – Present;
Chief Justice of the Delaware Supreme Court, May 2004 – November 2013;
Justice of the Delaware Supreme Court, July 2000 – May 2004;
Vice-Chancellor of the Delaware Court of Chancery, May 1994 – July 2000;
Resident Judge of the Delaware Superior Court, Kent County, November 1990 – May 1994;
Judge of the Delaware Superior Court, Kent County, May 1988 – November 1990
(appointed by Gov. Castle);
Prickett, Jones, Elliott, Kristol & Schnee, 1970; Dover - Resident Partner, 1973 – 1988;
Deputy Attorney General, DE. 1971 – 1972;
Delaware Senate Attorney, 1974;
Chairman, Consumer Affairs Board of DE, 1974 – 1988;
Member, Supreme Court Board on Professional Responsibility - 1974 –1986;
Member, Governor's Sentencing Reform Commission;
Former President, Kent County Bar Association;
Former Vice President, Delaware State Bar Association;
Member, Court Consolidation Committee (appointed by Senate), 1986;
Member, Sentencing Accountability Commission (appointed by Chief Justice), 1989-1994;
Member, Drug Abuse Coordinating Council;
Member, Commission on Delaware Courts 2000;
Member, Judicial Conference Committee on Federal-State Jurisdiction
(appointed by United States Supreme Court Chief Justice Roberts, 2006-2012);
Col., Ret., DE Army National Guard - Staff Judge Advocate, 261st Signal Command;
Inspector General, 1993 – 1996;

Chairman, Central Delaware Health Care Corp. (Bayhealth), 1988-1993, Board, 1986-1995;
Judicial Advisor and Member of ABA Business Law Section and its Mergers & Acquisitions Committee, 2002-2014;
Past President, Kiwanis Club of Dover; English Speaking Union;
Past Board Member, Children's Bureau;
Terry-Carey, American Inns of Court, Past President, Master, Member of the Board;
Associate Member of American Board of Trial Advocates;
Conference of Chief Justices, Board Liaison to the Government Affairs Committee;
National Center for State Courts, Member of Lawyers Committee;
Board Member of NACD Battlefield to Boardroom, Bayhealth Foundation; NACD Black Rock; Delaware Historical Society; Enlight Advisory Board; Director P.R.I.M.E. Finance; and current Advisory Board Chair of the University of Delaware Business School Weinberg Center of Corporate Governance;
Member of ABA Subcommittee on Private Equity M&A;
Member of The Oxford Mid Atlantic Council (finance and law professors from the University of Oxford together with a number of senior financial market participants);
Trustee, American College of Corporate Governance Counsel (equivalent to the American College of Trial Attorneys) with only 50 attorneys, academics and judges elected to membership nationwide.

HONORS

The Citadel School of Business Hall of Fame 2015 recipient.

NACD, The National Association of Corporate Directors, Governance Fellow and 2014 Hall of Fame recipient.

Kent County Levy Court Medal for Meritorious Service.

U.S. Chamber Institute for Legal Reform 2012 Judicial Achievement Award.

Past President of the Conference of Chief Justices (CCJ) and Chair of the National Center for State Courts (NCSC) Board of Directors for 2012-2013

Worldwide Registry inclusion in 2014-2015 Edition of Executives, Professionals and Entrepreneurs.

Ranked as second in its list of "the 100 Most Influential People in Business Ethics for 2007" by Ethisphere Magazine.

Ranked as one of the 100 most influential people in corporate governance in the United States by The Directorship Magazine.

Lawdragon Magazine has consistently placed him among its annual Lawdragon 500 "Leading Lawyers in America" and "Top Judges in America."

Co-Chair on the ABA Joint Task Force on M&A Litigation

PROFESSIONAL ACTIVITIES

International Law Conference 2015, Athens, Greece (June 2015)
Opening Keynote Address
Panel: *Business Formation, Start-Up, Operation and Regulation*

Annual International Mergers & Acquisition Conference, New York (June 2015)
Panel: *View from the Bench*

Citadel Directors Institute (CDI), Charleston, South Carolina (May 2015)
Panel Moderator:
- *Expansion of Aiding and Abetting Breaches of Fiduciary Duty – a Warning to Directors and their Advisors in M&A Scenarios*

Panel Member:
- *New Developments in Corporate Governance*

27th Tulane Corporate Law Institute (March 2015)
Panels: *Delaware Developments* and *"Getting to Closing"*

37th Annual Conference on Securities Regulation and Business Law, Texas (February 2015)
Panel: *How Recent Fiduciary Duty Cases Affect Advice to Directors and Officers of Delaware and Texas Corporations*

Company Law Symposium, South Africa (August 2014)
Keynote:
- *Takeovers and Mergers Including Poison Pills and What can be done in Contracts in Anticipation of Takeovers and Mergers*
- *The Business Judgment Rule and Directors' Conflicts of Interest*
- *Business Rescue*

Panel: *Trends in Company Law*

Citadel Directors' Institute, Charleston, South Carolina (May 2014)
Opening Keynote and Panel Moderator:
- *What is the Board's Role in M&A Acquisition, JV's and MBO's?*

The Quorum Club, Toronto – Keynote Dinner Speaker (October 2014)

New England M&A Forum Guest Speaker (December 2014)

Delaware Trial Lawyers Ethics Seminar Guest Speaker (December 2014)

AAJ Securities and Financial Fraud Litigation Group Roundtable Meeting, New York – Panel Member (December 2014)

Frequent Panelist and Keynote Speaker for American Bar Association; New York City Bar; Duke Business Law Society; Executive Compensation Conference (The Conference Board); Virginia Law & Business Symposium (Virginia Law School); Corporate Directors Forum;

Northwestern Law; Federal Securities Institute; Annual Conference on Securities Regulation & Business Law (University of Texas School of Law); Annual Albert DeStefano Lecture (Fordham Corporate Law Center); Corporate Governance Forum; Delaware Trust Conference; University of Texas Mergers & Acquisitions Institute; IBA Annual Conference; Delaware Business Law Forum; Society of Corporate Secretaries & Governance Professionals Delaware Law Issues Update Conference; New England Mergers & Acquisitions Forum.

PUBLICATIONS

"Appointment of Independent Directors on the Eve of Bankruptcy: Why the Growing Trend?" *Examining Delaware Corporate Governance Through the Nebulous Zone of Insolvency Lens and Delaware ABO Related Issues in the Bankruptcy Court* (April 10, 2014).

"The Moral Underpinning of Delaware's Modern Corporate Fiduciary Duties" (with Ryan Scofield and Jonathan Urick), 26 *Notre Dame J.L. Ethics & Pub. Pol'y* 3 (2012).

"Freedom of Contract and Default Contractual Duties in Delaware Limited Partnerships and Limited Liability Companies" (with John Allen Eakins), 46 *Am. Bus. L.J.* 221 (2009).

"Delaware's Guidance: Ensuring Equity for the Modern Witenagemot" (with J.W. Verret), 2 *Va. L. & Bus. Rev. 188* (2007).

"Judicial Scrutiny of Fiduciary Duties in Delaware Limited Partnerships and Limited Liability Companies," 32 *Del. J. Corp. L.* 1 (2007).

"On Corporate Law Federalism: Threatening the Thaumatrope" (with Sean J. Griffith), 61 *Bus. Law.* 1 (2005).

"Delaware's Closed Door Arbitration: What the Future Holds for Large Business Disputes and How it Will Affect M&A Deals," Panelist: Chief Justice Myron T. Steele, et al., *The Journal of Business Entrepreneurship & The Law, Pepperdine University School of Law*, Volume VI, Number II (October 30, 2012).

"Realigning the Constitutional Pendulum" (with Peter I. Tsoflias), *Albany Law Review*, Volume 77, Number 4 (2013/2014).

TEACHING EXPERIENCE

University of Pennsylvania Law School, Adjunct Professor of Law
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Pepperdine University Law School, Adjunct Professor of Law